

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OMNISOURCE CORPORATION,  
and

Case 08-CA-167138

UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED-INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION,  
AFL-CIO/CLC, LOCAL 9130-03

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF**  
**IN SUPPORT OF EXCEPTIONS TO**  
**ADMINISTRATIVE LAW JUDGE DECISION**

Karen N. Neilsen  
Counsel for the General Counsel  
National Labor Relations Board, Region 8  
1240 East 9th Street, Room 1695  
Cleveland, OH 44199

March 27, 2017

## **TABLE OF CONTENTS**

Table of Authorities .....	iii
Statement of the Case .....	1
Argument .....	2
Exception 1 - Search-for-Work and Related Expenses .....	2
Exception 2 - Consequential Economic Harm .....	3
Conclusion .....	9
Certificate of Service .....	10

## **TABLE OF AUTHORITIES**

### **U.S. Supreme Court Decisions**

<i>Carpenters Local 60 v. NLRB</i> , 365 U.S. 651 (1961) . . . . .	5
<i>NLRB v. Mackay Radio &amp; Tel. Co.</i> , 304 U.S. 333 (1938) . . . . .	5
<i>NLRB v. J.H. Rutter-Rex Mfg. Co.</i> , 396 U.S. 258 (1969) . . . . .	4, 5
<i>NLRB v. Seven-Up Bottling of Miami, Inc.</i> , 344 U.S. 344 (1953) . . . . .	4
<i>Landgraf v. USI Film Products</i> , 511 U.S. 244 (1994) . . . . .	8
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941) . . . . .	4, 5, 7
<i>Radio Officers' Union of Commercial Telegraphers Union v. NLRB</i> , 347 U.S. 17 (1954) . . . . .	4
<i>Virginia Elec. &amp; Power Co. v. NLRB</i> , 319 U.S. 533 (1943) . . . . .	4

### **U.S. Court of Appeals Cases**

<i>Greater Oklahoma Packing Co. v. NLRB</i> , 790 F.3d 816, 825 (8th Cir. 2015) . . . . .	6
---	---

### **U.S. District Court Cases**

<i>Pappas v. Watson Wyatt &amp; Co.</i> , No. 3:04-CV-304, 2007 WL 4178507 (D. Conn. Nov. 20, 2007) . . . . .	8
<i>Proulx v. Citibank</i> , 681 F. Supp. 199 (S.D.N.Y. 1988), <i>affd.</i> mem., 862 F.2d 304 (2d Cir. 1988) . . . . .	8

### **NLRB Decisions**

<i>BRC Injected Rubber Products</i> , 311 NLRB 66 (1993) . . . . .	6
<i>Deena Artware, Inc.</i> , 112 NLRB 371 (1955), <i>enfd.</i> , 228 F.2d 871 (6th Cir. 1955). . . . .	6

<i>F.W. Woolworth Co.</i> , 90 NLRB 289 (1950) . . . . .	5
<i>Graves Trucking</i> , 246 NLRB 344 (1979), <i>enfd as modified</i> , 692 F.2d 470 (7th Cir. 1982). . . . .	3
<i>Isis Plumbing &amp; Heating Co.</i> , 138 NLRB 716 (1962), <i>enf. denied on other grounds</i> , 322 F.2d 913 (9th Cir. 1963) . . . . .	4
<i>Kentucky River Medical Center</i> , 345 NLRB 6 (2010) . . . . .	3, 4
<i>King Soopers, Inc.</i> , 364 NLRB No. 93 (2016) . . . . .	2, 3
<i>Lee Brass Co.</i> , 316 NLRB 1122 (1995), <i>enfd. mem.</i> , 105 F.3d 671 (11th Cir. 1996) . .	8
<i>New Horizons</i> , 283 NLRB 1173 (1987) . . . . .	2
<i>Nortech Waste</i> , 336 NLRB 554 (2001) . . . . .	6, 7, 8
<i>Operating Engineers Local 513 (Long Const. Co.)</i> , 145 NLRB 554 (1963) . . . . .	3, 7, 8
<i>Pacific Beach Hotel</i> , 361 NLRB No. 65 (2014), <i>denied in part sub nom.</i> , HTH Corp. v. NLRB, 823 F.3d 668 (D.C. Cir. 2016) . . . . .	5, 7
<i>Pilliod of Mississippi, Inc.</i> , 275 NLRB 799 (1985) . . . . .	8
<i>Roman Iron Works</i> , 292 NLRB 1292, 1294 (1989) . . . . .	6
<i>Service Employees Local 87 (Pacific Telephone)</i> , 279 NLRB 168 (1986) . . . . .	8
<i>Tortillas Don Chavas</i> , 361 NLRB No. 10 (2014) . . . . .	3, 4, 6

#### Law Journals

Catherine H. Helm, <i>The Practicality of Increasing the Use of Section 10(j) Injunctions</i> , 7 INDUS. REL. L.J. 599, 603 (1985) . . . . .	3
---	---

## **STATEMENT OF THE CASE**

On February 13, 2017, Administrative Law Judge (ALJ) Paul Bogas issued a Decision finding that Respondent had unlawfully discharged four of its employees in violation of Section 8(a)(3) and (1) of the Act. The General Counsel files exceptions to this Decision limited to errors concerning the ALJ's recommended remedial order. Specifically, the Judge erred by failing to order Respondent to reimburse the employees for all search-for-work and work-related expenses regardless of the amount of their interim earnings. The General Counsel further urges the Board to enhance its current policy concerning its make-whole remedies by ordering Respondent to reimburse the discriminatees for consequential economic harm incurred as a result of their unlawful discharges.

Respondent is a scrap metal recycling company operating approximately 70 facilities of which only seven are unionized. (JD at 2, ¶ 4, ll. 1-4). The Charging Party, United Steel Workers Local 9130-3 (Union or USW), represent approximately 34 unit employees working at Respondent's scrap yard located in Mansfield, Ohio. (JD at 2, ¶ 4, ll. 7-9).

This case stems out of a grievance filed by employee Roy Thompson under the parties' collective-bargaining agreement and a 1992 Letter of Understanding. (JD at 10, ¶ 1, ll. 18-21; GC Exhs. 2, 3, 6). Three union officials, employees Ricky Dean, Darrell Smith and Terry Timman, assisted Thompson with the filing and then processing of his grievance. On December 7, 2015, Thompson's grievance was presented verbally by the Union's representatives under Step 1 of the parties' contractual grievance procedure. (Tr. 342, 594-95, 892). The following day, a written grievance was processed by the Union's representatives to Step 2 under the grievance

procedure. (JD at 10, ¶ ll. 21-23; GC Exh. 2). However, instead of answering the grievance, Respondent terminated the four employees on December 18, 2015. (JD at 21, ¶ 2, ll. 1-2).

As found by ALJ Bogas, “[t]he ferocity of management’s response to the Union’s grievance in this case is, in my view, shocking. Rather than simply accepting or rejecting the grievance, the Respondent discharged every one of the employees involved with pursuing that grievance.” (JD at 21, ¶ 3, ll. 1-2).

## **ARGUMENT**

### **Exception 1 - Search-for-Work and Work-Related Expenses**

The General Counsel excepts to the ALJ’s error in failing to order that the four discharged employees be reimbursed for all search-for-work and work-related expenses regardless of whether the discriminatees received interim earnings in excess of these expenses. (JD at 22, n. 14).

In *King Soopers, Inc.*, 364 NLRB No. 93 (August 24, 2016), the Board modified its policy on make-whole remedies to require respondents to fully compensate discriminatees for their search-for-work expenses and other expenses incurred in connection with interim employment. Specifically, the Board found that search-for-work expenses and interim employment expenses should be awarded regardless of whether the expenses exceed an employee’s interim earnings, i.e., these type of expenses should not offset interim earnings. *Id.* at 8.

Accordingly, as part of the make-whole remedy in the instant matter, the Board should order that the discharged employees’ quarterly search-for-work and work related expenses shall not be offset by any interim earnings, and that the amounts be calculated separately from taxable

net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded on a daily basis as prescribed in *Kentucky River Medical Center*, 345 NLRB 6 (2010). *King Soopers*, 364 NLRB No. 93, slip op. at 9.

## **Exception 2 - Consequential Economic Harm**

The General Counsel excepts to the ALJ's failure to order that the four discharged employees be reimbursed for all consequential economic harm incurred by them as a result of Respondent's unlawful conduct. (JD at 22, n. 14).

Under the Board's present remedial approach, some economic harms that flow from a respondent's unfair labor practices are not adequately remedied. *See* Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *See e.g., Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), *enfd. as modified*, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require Respondent to compensate employees for all consequential economic harms that they sustain, prior to full compliance, as a result of Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c)

to fashion appropriate remedies that will best effectuate the policies of the Act.” *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board’s remedial structure is to “make whole” employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers’ Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore “the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act’s “general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company’s” unlawful act).

Moreover, the Supreme Court has emphasized that the Board’s remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must “draw on enlightenment gained from experience.” *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act’s make whole remedial



objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enf. denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that “the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress”). Compensation for employees’ consequential economic harm would further the Board’s charge to “adapt [its] remedies to the needs of particular situations so that ‘the victims of discrimination’ may be treated fairly,” provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014), *denied in part sub nom.*, *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent’s unlawful conduct.

Reimbursement for consequential economic harm achieves the Act’s remedial purpose by restoring the economic status quo that would have been obtained but for a respondent’s unlawful act. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs

associated with obtaining a new house or car for the employee.<sup>1</sup> Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).<sup>2</sup>

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enfd.*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554

---

<sup>1</sup> However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

<sup>2</sup> Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer), *denied in part sub nom.*, *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct. Therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and

suffering.<sup>3</sup> In *Nortech Waste*, *supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving “pain and suffering” damages that were inherently “speculative” and “nonspecific.” *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee’s consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), *enfd. mem.*, 105 F.3d 671 (11th Cir. 1996)).<sup>4</sup>

As set forth above, including reimbursement for the consequential economic harm that employees suffer as a result of unlawful changes to their employment is well within the Board’s remedial power. The Board’s ability to craft make-whole remedies is not merely centered around backpay and reinstatement. Reimbursement for consequential economic harm restores the economic status quo that is at the heart of the Act’s remedial purpose. As a direct result of a

---

<sup>3</sup> This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

<sup>4</sup> The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized “damages for ‘future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.’” *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, No. 3:04-CV-304, 2007 WL 4178507, at \*3 (D. Conn. Nov. 20, 2007) (“[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages” for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affd. mem.*, 862 F.2d 304 (2d Cir. 1988).

respondent's unlawful behavior, the entire lives of employees and their families are most often forced to change for the worse because they no longer have the economic means to sustain themselves. By fully restoring the status quo, as urged by the General Counsel, the Board will lessen the economic harm already suffered by employees because of a respondent's unfair labor practices. The four discharged employees in this case are not an exception. Accordingly, after a full briefing, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it is necessary to make discriminatees whole.

### **CONCLUSION**

Counsel for the General Counsel hereby requests that the above remedial exceptions to the Administrative Law Judge's decision be granted. Counsel for the General Counsel submits that such orders are warranted based on the record evidence and the law.

Respectfully submitted,

/s/ Karen N. Neilsen

Karen N. Neilsen, Counsel for the General Counsel  
National Labor Relations Board, Region 8  
1240 East 9th Street, Room 1695  
Cleveland, OH 44199  
Phone: 216-303-7384  
Fax: 216-522-2418  
karen.neilsen@nrlrb.gov

March 27, 2017  
Cleveland, Ohio

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Counsel for the General Counsel's Brief in Support of Exceptions to Administrative Law Judge Decision was e-filed with electronic copies sent by e-mail to the following parties on this day, March 27, 2017:

Dan Kovalik, Senior Associate General Counsel  
Counsel for the Charging Party  
United Steel, Paper and Forestry, Rubber,  
Manufacturing, Energy, Allied-Industrial and  
Service Workers International Union  
United Steel Workers Legal Department  
60 Boulevard of the Allies, Ste. 807  
Pittsburgh, PA 15222-1209  
Phone 412-562-1679 Fax 412-562-2574  
DKovalik@usw.org

Cathleen M. Shrader, Esq.  
Anthony M. Stites, Esq.  
Counsel for Respondent  
Barrett & McNaghy  
215 East Berry Street  
P.O. Box 2263  
Fort Wayne, IN 46801  
Phone: 260-423-9551 Fax: 260-423-8920  
CMS@barrettlaw.com; AMS@barrettlaw.com

Respectfully submitted,

/s/ Karen N. Neilsen  
Karen N. Neilsen, Counsel for the General Counsel  
National Labor Relations Board, Region 8  
1240 East 9th Street, Room 1695  
Cleveland, OH 44199  
Phone: 216-303-7384 Fax: 216-522-2418  
karen.neilsen@nrlrb.gov